In the Matter of	)	
	)	
TRACY A. JAMES,	)	Date issued: **AUG. 22, 1996**
	)	
Complainant,	)	Case No. 96-ERA-5
	)	
vs.	)	**RECOMMENDED**
	)	**DECISION AND**
PRITTS-MC ENANY ROOFING, INC.,	)	**ORDER**
	)	
Respondent.	)	
_____	)	

Appearances:

Louis D. Putney, Esq.
4805 South Himes Avenue
Tampa, Florida 33611

(813) 831-3376

Lorraine E. Robinson, Esq.
Law Offices of Dale M.Swope, P.A.
777 S. Harbour Island Boulevard
Suite 850
Tampa, Florida 33602
(813) 273-0017

Before:

Christine McKenna
Administrative Law Judge

I. JURISDICTION

This is a "whistleblower" proceeding arising under the employee protection provisions of the Energy Reorganization Act of 1974 [hereinafter "ERA" or "the Act"], 42 U.S.C. §5851, and the applicable regulations at 29 C.F.R. Part 24. The ERA prohibits an employer from discharging or discriminating against an employee, in terms of salary or work conditions, as a result of the employee's notifying the employer of, or commencing proceedings to enforce, safety violations in connection with nuclear energy facilities.

II. SUMMARY CONCLUSION

Complainant Tracy James was hired in August 1995 as a firewatch and nuclear security escort with Pritts-McEnany Roofing, Inc. The company was in the midst of a large roofing project that it had contracted to perform at the Crystal River nuclear plant owned by Florida Power. The company had never worked at a nuclear plant before, and this was its biggest job in history. It did not fully appreciate the importance of safety and security at a nuclear plant.

Ms. James is a young woman in her early thirties. She was put in charge of a crew of roofers of another cultural background who demonstrated almost total disregard for her authority and refused to follow her safety instructions. On October 11, 1995 she reported a security violation by one of the crew members who had disregarded her escort instructions, whereupon the remainder of the crew walked off the job in protest. She was discharged by respondent's CEO, Mike McEnany, on October 11, 1995 because of her enforcement of security regulations, in order to get the crew back to work.

Though respondent attempted to revoke the discharge a few hours later, the damage had been done, and the environment at the plant made it impossible then, and makes it impossible now, for complainant to return to that position.

She has suffered damages in the form of lost wages and emotional distress as a result.

III. PROCEDURAL HISTORY AND THE PARTIES' CONTENTIONS

Ms. James' complaint of a "whistleblower" violation was investigated by the Wage and Hour Division [WHD] of the Department of Labor, and found to be substantiated. However, WHD held that damages could not be awarded because of the employer's immediate offer to reinstate her and, later in negotiations, to pay back wages. [ALJX 1] Complainant submitted a timely request for hearing [ALJX 2]. The case went to hearing before the undersigned administrative law judge on April 16, 1996 in Tampa, Florida.

The record consists of ALJX 1-21; CX 1-17, 19-24, and RX 1-2 and 4. [1]

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[1] References in the text are as follows: "ALJX __" refers to the administrative law judge or procedural exhibits received after referral of the case to the Office of Administrative Law Judges; "CX __" refers to claimant's exhibits; "RX __" to respondent's exhibits; and "TR __" to the transcript of proceedings on April 16, 1996. The following ALJ exhibits were admitted post-hearing:

19: Respondent's post-hearing brief
20. Respondent's supplemental citation of authority, dated June 17, 1996
21. Complainant's post-hearing brief

The parties entered into various stipulations of fact and law, narrowing the issue(s) to be resolved, in a thorough and admirable piece of legal work by their counsel [ALJX 18]. The parties agree, in essence, that Ms. James was engaged in protected activity; that respondent knew of the protected activity; and that there is a temporal proximity between the protected activity, the respondent's knowledge thereof, and her firing that would justify an inference of causation. While respondent admits that complainant was *told* that she had been discharged, respondent's position is that she was not actually discharged, because the "firing" was an impulsive move by the company's president, withdrawn only a few hours later with an immediate offer to reinstate. Even assuming she had been discharged, respondent contends that the protected activity was not the motivation for the discharge. Rather, respondent alleges that the reason she was fired was her supposedly pushy, unfair conduct with the crew that caused the crew to be unable to work with her.

IV. STIPULATIONS

The parties have stipulated as follows:

This proceeding arises under the Energy Reorganization Act provisions prohibiting employers from taking retaliatory action against workers who complain or report about nuclear safety matters, 42 U.S.C. §5851. Respondent, Pritts-McEnany Roofing, Inc. is an employer subject to the Act. Pritts-McEnany Roofing, Inc. is located in and does business in Tampa, Florida, and is the same corporation known as McEnany Roofing, Inc. Tracy James was an employee of respondent on October 11, 1995. Her whistleblower complaint under the Act was timely filed, as was her request for hearing. She has complied with all procedural requirements necessary to present a claim under the Act.

Before coming to work for respondent Pritts-McEnany Roofing, complainant Tracy James worked on and off at the Crystal River nuclear plant, owned and operated by Florida Power Corporation, as a laborer, firewatch and security escort. James came to work for respondent on August 14, 1995 and was employed with respondent until October 11, 1995. During all material times, she possessed a nuclear security clearance badge ("green badge"). James served as firewatch and nuclear security escort for respondent's roofing crew. The members of the roofing crew had "red badges," meaning that they were not authorized to be on the premises of the nuclear plant without a properly badged security escort.

On October 11, 1995, at approximately 10:30 a.m. James was supervising respondent's roofing crew on the Intermediate roof at the Crystal River plant. She was informed that one of the crew members, Jose Ramirez, needed to use the restroom. The company foreman, Mike Morgan, told her to assemble the men to take their regular morning break, during which time Ramirez would be able to use the restroom. As she began to escort

the crew to the break area, Ramirez began to walk out in front and away from the group. He continued to walk on although James shouted for him to stop on several occasions. James says that because she lost sight of Ramirez (a fact respondent disputes; see Fn. 3), she called plant security guards who located him in a restroom. The guards explained to Ramirez that he was required to follow his security escort's instructions. Complainant proceeded to escort all the men to the break area. James asked the security guards to escort Ramirez off the premises after (she claims) he called her an insulting name in the break room.[2] Being escorted off the premises meant that Ramirez would be barred from returning to work at the plant.

In response to a request by plant security personnel, James prepared a written report of the incident, describing the foregoing facts and alleging a violation of security escort regulations by Jose Ramirez. The parties agree that this constitutes protected activity under the nuclear whistleblower protection provision of the Act (see Paragraph 8, ALJX 18, p 3).[3] Around 11:30 a.m., Mike McEnany learned from his foreman that Ramirez had been removed as a result of complainant's report, and also that the remainder of the crew had walked off the job in protest, insisting that they would not work with James. McEnany directed the foreman to discharge the complainant, which he did. It is undisputed that respondent knew at the time of her discharge that complainant had reported Ramirez for failing to abide by her escort instructions.

V. ISSUES

1. Whether respondent Pritts-McEnany discharged or otherwise discriminated against complainant on October 11, 1995, in violation of Section 211 of the Act?
2. Assuming respondent's conduct on October 11, 1995 constituted a discharge or adverse employment action, whether such discharge or discrimination was motivated, at least in part by the complainant's engaging in protected activities?

3. Assuming respondent is found to have violated the Act, what damages and/or remedies are to be awarded?

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[2]Respondent does not stipulate that Ramirez called James an insulting name.

[3]Despite its stipulation that complainant was acting properly and in complete compliance with her duties as an escort when she reported Ramirez to the security personnel, respondent also contends that it is proper ***if*** she actually lost "visual and conversational voice control" of the man (see Paragraph 5, ALJX 18, p. 3). Respondent disputes that she lost such control, and contends that Ms. James made a poor judgment, given the minor nature of the transgression by Ramirez (Id at Paragraph 3, p. 7; and ALJX 19, pp. 5-6).

VI. DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

LIABILITY

There being adequate support in the record for the parties' stipulations in Paragraph IV herein, those stipulations are hereby incorporated into this Paragraph VI as Findings of Fact and Conclusions of Law, as if fully set forth.

A. The Energy Reorganization Act

The Energy Reorganization Act of 1974 abolished the Atomic Energy Commission and established the Nuclear Regulatory Commission, whose primary function was to license and regulate nuclear facilities, and in particular to assure their safe operation. 42 U.S.C. §§5841-5850. Central to the ERA were provisions for employee protection from discriminatory and/or retaliatory personnel action for having reported unsafe acts by the employer facility. The Act as amended in 1992 applies to all claims filed on or after October 24, 1992 and thus governs this proceeding. The Act provides at 42 U.S.C. §5851 that:

> **(a) Discrimination against employee**
>
> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms conditions, or privileges of employment because the employee ... --
>
> > (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. §§2011 et seq.); ...

Section 5851(b) of the Act refers to standards of proof:

> **(b) Complaint, filing and notification:**
>
> ...**(3)(C)** The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this

> section was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> **(3)(D)** Relief may not be ordered ... if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

The burdens of proof under the Act have been adopted from the model articulated by the Supreme Court in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) and, more recently, in St. Mary'sHonor Center v. Hicks, __ U.S. __, 113 S.Ct. 2742 (1993). See Rogers v. Multi-Amp. Corp., 85 ERA-16 (Sec'y, December 18, 1992).[4] Under this model, the complainant must, at the outset and at a minimum, "... set forth facts which justify an inference of retaliatory discrimination," that is, the existence of protected activity and an inference of a causal connection with that activity and adverse employment action, in order to establish a *prima facie* case. Bartlik v. Tennessee Valley Authority, 73 F.3d 100, 103 (6th Cir. 1996); Pillow v. Bechtel Construction Inc., 87-ERA-35 (Sec'y, July 19, 1993).

While proof of a *prima facie* case is a predicate for shifting the burden of production to the employer, it is well established that proof sufficient to show a *prima facie* case is not enough to establish the claim itself. Claimant must demonstrate retaliatory, discriminatory action in violation of the statute, and always bears the ultimate burden of persuasion. Saint Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S.Ct. 2742 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); Dysert v. Florida Power Corp., 93-ERA-21 (Sec'y August 7, 1995), *appeal docketed Dysert v. Sec'y of Labor*, No. 95-3298 (11th Cir. September 28, 1995). In Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y January 18, 1996), the Secretary provided a thorough restatement of the burdens of proof and production in ERA whistleblower cases under the Act as amended in 1992:

> Under the burdens of proof and production in "whistleblower" proceedings, a complainant who seeks to rely on circumstantial evidence of intentional discriminatory conduct must first make a prima facie case of retaliatory action by the respondent, by establishing that he engaged in protected activity, that he was

[4]When Section 5851 was added to the Energy Reorganization Act in 1978, the Senate Committee Report summarized the employee protection provision as "substantially identical" to whistleblower provisions in the Clean Air Act and the Federal Water Pollution Control Act, both of which were modeled after the Federal Mine Safety Act. S. Rep. No. 95-848 (May 15, 1978), *reprinted in* 1978 U.S. Code Congressional and Administrative News 7303. As a result, the law that has developed under the environmental statutes is instructive in ERA cases.

> subjected to adverse action, and that the respondent was aware of the protected activity when it took the adverse action. ... Additionally, a complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. ... If a complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. ...
>
> The complainant bears the ultimate burden of persuasion that the respondent's proffered reasons are not the true basis for the adverse action, but are a pretext for discrimination. ... The complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for protected activity. ... Pursuant to Section 211(b)(3) of the ERA, however, if it has been established that the protected activity contributed to the adverse action, the employer must demonstrate by "clear and convincing evidence" that it would have taken the adverse action in the absence of the protected activity. ..

The four key elements of the *prima facie* case, then, are that

> (1) the employee engaged in protected activity;
> (2) the employer knew of the protected activity;
> (3) the employee was subjected to adverse action; and
> (4) the protected activity was the likely reason for the adverse action.

Once the complainant satisfies these four elements, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. The burden shifting to the employer at that point is only to articulate a legitimate, nondiscriminatory, reason for the adverse action. The employer's burden at this point is one of production, not of proof. Saporito v. Florida Power and Light, 90 ERA 27 and 47 (Sec'y August 8, 1994). Once the employer produces such evidence, the burden of production shifts back to the complainant to establish that the employer's proffered reason is pretextual or otherwise not legitimate. Bechtel Construction Co. v. Sec'y of Labor, 50 F.3d 926, 934 (11th Cir. 1995). At that point, the *prima facie* case analysis is no longer useful. USPS Board of Governors v. Aikens, 460 U.S. 711, 714 (1983); Carroll v. Bechtel Power Corp., 78 F.3d 352 (8th Cir. 1996) *aff'g* 91-ERA-46 (Sec'y February 15, 1995). The burden

remains always with the complainant to establish by a preponderance of the evidence (1) protected activity, (2) a causal nexus to the adverse action, and (3) in response to the employer's proffering evidence of a non-discriminatory reason, evidence of pretext.

Once the evidence establishes that the proffered reason is not legitimate, then the employer must establish by "clear and convincing evidence" that it would have taken the adverse employment action independently of complainant's protected activity. Zinn v. University of Missouri, *supra*, 93-ERA-34 and 36 (Sec'y, January 18, 1996).[5]

The record must be examined in light of the foregoing standards.

B. The elements of Complainant's case:

(1) Protected Activity

The security rules at the Crystal River facility provide in pertinent part ["you" refers to respondent]:

> "You may ... find it necessary to escort another individual(s) who cannot be granted unescorted access. This is an extremely important function as you are responsible for the safety, welfare, and conduct of your visitor(s). The following rules apply when escorting ...
>
> Escorts shall maintain both visual and conversational voice control over visitor(s).

[CX 17, pp. 15-16]

[5]In a ruling one month after Zinn, the Secretary clarified that it is only when the evidence establishes that both legitimate and discriminatory factors contributed to the decision to take the adverse action -- the dual, or mixed, motive doctrine -- that "clear and convincing" evidence is required from the employer. In other words, where there are both legitimate and prohibited motivations for an adverse employment action, the employer escapes liability only by "clear and convincing" evidence that the action would have been taken in the absence of the protected activity. Remusat v. Bartlett Nuclear, Inc., 94-ERA-36, Slip. Op. at pp. 3-5 (Sec'y February 26, 1996). See also Gibson v. Arizona Public Service Co., 90-ERA-29, -46, and -53, Slip Op. at pp. 2-3 (Sec'y September 18, 1995). Although the more recent decision in Timmons v. Mattingly Testing, 95-ERA-40 (ARB, June 21, 1996) did not make such a clear distinction, it is consistent with the ruling in Remusat, and I shall therefore apply the "clear and convincing evidence" standard in the dual motive analysis.

Although respondent appears to concede that James was engaged in protected activity when she reported Ramirez to plant security guards for walking away from his security escort, it suggests a caveat by asserting that it was proper for her to report Ramirez *if* she actually lost visual and conversational voice control over him, and/or she exercised good judgment in reporting him. In other words, respondents argue that there must have been an actual security violation, that is, that James had to have been correct and not mistaken; and further that James is required to have used good judgment under the circumstances, in order to constitute protected activity.

At the outset, I conclude that the very essence of James' job was to provide a safety-security service within this nuclear facility and to report violations of the plant rules. As with employees responsible for quality control functions in a nuclear power plant, reporting safety violations in the regular course of her duties constitutes protected activity under the ERA. Jopson v. Omega Nuclear Diagnostics, 93-ERA-54 (Sec'y, August 21, 1995). As a result, virtually any report or enforcement action she takes in furtherance of her job duties constitutes protected activity *per se*. Collins v. Florida Power Corp., 91-ERA-47 (Sec'y, May 15, 1995).

In addition, even if filing a report did not constitute protected activity *per se*, the Act contains no provision requiring a complainant to prove the violation by Ramirez. The absence of such a provision is not insignificant: the Congress knows full well how to insert such a requirement in a whistleblower statute, and has done so as one of the alternative bases of relief under the whistleblower provisions of the Surface Transportation Assistance Act, 49 U.S.C. App. § 31105 (a)(1)(B)(I). To require that the complainant prove the actual underlying violation would frustrate the purpose of the Act, which is to foster the free flow of information about safety concerns in a nuclear facility and to assure compliance. Indeed, the statute is read broadly in order to further the remedial purposes of the Act. Bechtel Construction Co. v. Secretary of Labor, *supra*, 50 F.3d at 932; Tyndall v, U.S. Environmental Protection Agency, 93-CAA-6 and 95-CAA-5 (ARB, June 14, 1996). The only requirement for an employee's conduct to come under the umbrella of "protected activity" is that she demonstrate a "reasonably perceived" violation of the underlying statute, regulation or safety standard. Minard v. Nerco Delamar Co., 92-SDW-1 (Sec'y, January 25, 1994); Oliver v. Hydro-Vac Serv., Inc. 91-SDW-1 (Sec'y, November 1, 1995), slip op. at 14.

James explained that on the morning of October 11, 1995, she was assembling the seven roofing crew members -- all "red badge" workers -- to go on their break, but Jose Ramirez went ahead on his own:

Q: So, what occurred then as the crew began to assemble to go on break?

A: Jose Ramirez opened the door and entered the plant.
Q: Okay. At some point did you lose your visual and conversational control over Mr. Ramirez?
A: Yes, when he opened that door and entered the plant I had, at that time, but I ran to the door and I held open the door and I told him to stop ... repeatedly.
Q: Did he hear you?
A: Yes.
Q: How do you know that?
A: Because he turned around and looked at me and said "Na ... na".
Q: And then what happened?
A: I kept saying stop please, alto, which in Spanish means stop, that's what they tell me. I kept repeatedly telling him to stop and he's telling me "no" and he keeps going and I'm still trying to get my other six ... badges off the roof and telling them come on hurry and I'm trying to keep sight of him and get them together and come on."

* * *

A: I lost sight of him and I'm trying to hurry with my other people and I was trying to catch him and I couldn't catch him and I lost sight of him 'cause he had to go downstairs if he went the way I thought he went. So that's where I'm heading, trying to catch. And I lost sight of him and my job as a security escort is to contact security if I lose a red-badge because they're my responsibility."

[TR 51-54].

The employer introduced only the testimony of Kathleen Roberts, a second escort/fire watch employee who worked with complainant, in an attempt to refute complainant's version of the events.[6] The general gist of Ms. Roberts' testimony was that although the crew grumbled about safety rules and sometimes ignored them, they would usually obey them when reminded [TR 181]. It was Ms. Roberts' conclusion that at the particular instant when she saw James and Ramirez on October 11, 1995, James had an unobstructed view of Ramirez, and there was no escort violation [TR 198-199], but she admitted that she did not see the entirety of the incident. Specifically, she testified that she was standing at the soda machines in the break room when she saw James at the bottom of the stairs, Ramirez ahead of her, and the remainder of the crew coming down the stairs behind her. Robert was about 20-25 feet away from this scene. She saw nothing further, because she and the people she

[6]Mike Morgan, the general superintendent for McEnany Roofing, testified that he did not see the problem between James and Ramirez [TR 219].

was escorting then went another route [TR 188-90; RX 5]. Ms. Roberts admitted that that was the extent of her knowledge:

A. But I don't know what's happened up here or anywhere else, I can just verify what was on the steps and what I seen and what I seen from the soda machines.

[TR 196]

Roberts admitted that she knew nothing of what may have happened during the time James was escorting the crew from the roof up to the point she [Roberts] saw them on the stairs. This is because she and her own escorts had left the roof from a different door:

Q: You went another back way off the roof?
A: I went down the back steps. The back steps are right by the door to the turbine deck there.
Q: And you didn't see, from the time you left, until this point, you had already gotten all the way down to the machines. You don't know what happened between the time you left the roof and you got down to the [soda] machines, do you?
A: We took the 119 elevation through a little walk way there, there's machinery, and then there's soda machines there are at the other end where them steps are.
Q: Would you answer the question, you don't know what happened from the time you left the roof until you were down at the soda machines, do you?
A: No.
Q: You don't know what escort violations may have occurred ...
A: No, I don't

* * *

Q: And you ... you said on Direct, you heard something about someone calling security as they were coming down the stairs. Didn't you?
A: I heard Tracy saying something.
Q: About calling security?
A: Yes.
Q: She was yelling to Mr. Ramirez she was going to call security, wasn't she?
A: Something like that, yes. ...
Q: So if there was a violation, it happened before you ever saw anything?
A: Probably.

[TR 211-213] See also TR 208

I find the evidence undisputed that complainant lost voice and visual control over Ramirez for a sufficient length of time that she reasonably perceived a violation of the security escort rules of the plant. Ms. Roberts admits she did not see the key events when James and her escorts were en route from the turbine deck. I credit James' testimony in this regard, and in particular her explanation that Roberts could not have seen much at all from the soda machines, given the angle of the stairs [TR 276-278]. By the time Roberts caught a glimpse of the situation, the problem had already occurred.

(2) Respondent's Awareness of the Protected Activity

It is undisputed that respondent knew of James' report of Ramirez to the nuclear plant security personnel. This is more than adequately supported in the record [e.g., TR 222, 230, 234]

(3) Adverse Employment Action

Respondent contends that its firing of James at 11:30 a.m. does not constitute a discharge because she was "unfired" and offered her job back at 1:30 p.m. when the company's CEO discovered that it had been illegal to fire her in the first place.

This contention misses the mark. The statute prohibits not only discharge but *any* form of discriminatory or adverse employment action as a result of protected activity. James need not prove a full-fledged discharge. Many employment decisions short of discharge or suspension constitute adverse employment action under the Act. Dias-Robainas v. Florida Power and Light, 92-ERA-10 (Sec'y, January 19, 1996). In any event, respondent's message to James at 11:30 was unequivocal: "you're fired." This was not merely an offhand remark, nor a slap on the wrist, nor a mere "talking to" and James understood the import of it full well [TR 72, 75]. Moreover, there is no authority for the proposition that because an employer realizes his rash mistake within a few hours, no mistake was made.

The respondent's contention is not supportable, a conclusion that is all the more apparent in the context of the prior problems experienced on this job with this crew in terms of safety concerns. James had previously expressed numerous concerns about the crew's unwillingness to cooperate with her safety instructions and the security rules. The foreman, Mike Morgan, always promised to do something about it, but the company never did anything effective (until after the fact), indicating only a grudging regard for safety issues [TR 154]. McEnany regarded her complaints as petty and silly and responded by restricting access to the main office [CX-18 and TR 226-227] In the context of months of frustration in trying to do her job, without much support and without access to the people in

management who could help her, the message "you're fired" after filing a security report cannot constitute anything but an adverse employment action. At best, the employer's later attempted withdrawal amounts to mitigation, but does not undo the damage done.

Respondent argues that a "discharge in the context of the Act has to be more than words because the Act is seeking to protect the employee from the consequences of real retaliation by the employer, not words." This argument seeks to reduce the circumstances surrounding the incident to something quite different than they really were. McEnany told Morgan to fire James in the immediate aftermath of a very disturbing confrontation with crew members who had defied her repeatedly in the past while management looked the other way. To suggest that the latter is mere mismanagement "that [did] not ultimately result in any retaliation" [ALJX 19, p. 13] dilutes the real import of respondent's actions.[7]

Nor do I accept respondent's suggestion that James had some duty to accept McEnany's offer of reinstatement, "to give him an opportunity" to address her concern about the crew. Nothing in the law or the record before me suggests that she was required to give him another chance. Quite, the contrary, if she had not been fired, she would have the right to refuse to return to work until McEnany corrected the situation in which she found herself on October 11.[8] McEnany certainly had not accomplished that when he offered reinstatement. As discussed later in this decision, he finally did take positive steps to see that the crew complied, but James was never told this [TR 258-259]. In fact, the converse of respondent's argument is true: it is James who was not given the opportunity to return to an acceptable environment. She did not owe McEnany another chance to create an

[7]This situation is distinguishable from that in McDonald v. University of Missouri, 90-ERA-59 (Sec'y March 21, 1995). In that case, after complainant told him about a co-worker's safety violations, a senior professor upset about the discord in his laboratory asked the complainant to finish up her work within a couple of months and leave. This action did not immediately change her status as an employee or as his assistant, and the personnel office was not informed. The professor changed his mind, however and her contract was subsequently renewed twice. In the ensuing two months, the professor equivocated about whether and when to discharge her (or rather, not renew her contract). Such is not the case here, where the words "you're fired" conveyed an immediate and unmistakable message that James' status as respondent's employee was ended. In addition, McDonald involved the question of whether the discharge was sufficiently "final and unequivocal" to start the 30-day clock running within which a complaint had to be filed, an issue not present in this case.

[8]A worker is protected in her refusal to return to work where she has a good faith belief that working conditions are unsafe. Whether they are actually unsafe is not the question, but rather the reasonableness of her concern for her safety: her belief must be reasonable under the circumstances. Her refusal to return to work remains protected until the objectional conditions are investigated and cure, and she is adequately informed that they have been cured. Pensyl v. Catalytic, Inc., 83-ERA-2 (Sec'y, January 13, 1984).

acceptable work environment. She had already tried that on a number of occasions previously, and her concerns were labeled petty or silly.

I do agree with respondent, however, that McEnany's quick realization that he had been wrong and his quick attempt to rectify the situation is admirable and to be commended. That does not mean that no harm was done, although an employer's candidly taking responsibility may minimize the damage resulting from an adverse action.

(4) Causation

To complete her *prima facie* case, a complainant must present evidence sufficient to raise the inference that her protected activity was the likely reason for her discharge. This is not an onerous burden, and at this juncture, the claimant is not required to prove motivation by a preponderance of the evidence. McMahan v. California WQCB, 90-WPC-1 (Sec'y, July 16, 1993). Because it is rare that a complainant can produce direct evidence establishing a connection between protected activities and an adverse employment action, it is well established that a complainant may prove such a connection with circumstantial evidence, in particular a temporal proximity. Bechtel Construction Co. V. Secretary of Labor, 50 F.3d 926, 934 (11th Cir. 1995). Respondent concedes that McEnany's immediate "you're fired" response to James' reporting Ramirez raises an inference of causation. McEnany admits that the "voice and visual control" provision of the security rules was the section that James was enforcing just before being fired [TR 250].

I therefore find and conclude that Tracy James has established a *prima facie* case of whistleblower discrimination under the Act.

C. Respondent's Stated Reasons for Firing Complainant

1. Whether Respondent has articulated a legitimate nondiscriminatory reason for discharging Complainant.

Because complainant has established a *prima facie* case of retaliatory discharge, the burden shifts to respondent to produce evidence that her discharge was motivated by a legitimate, non-prohibited reason.

Respondent argues that the reason James was discharged is that the crew refused to work with her any longer and walked off the job, which in turn was due to her unreasonable and pushy behavior. [See, e.g., ALJX 19, p. 11 and TR 223-224]. But the record does not support the allegation that she actually was pushy or unreasonable, or that her personality

had anything to do with her discharge on October 11, 1995. Mike McEnany put his reasons in a nutshell:

> A: I ... talked with Mike [Morgan], Mike told me that Tracy had kicked Chickaleen [Ramirez] off the roof and that consequently ... the remaining part of my crew refused to work. ... they were refusing to go back to work if Tracy continues to work. Regrettably, I said okay, well ... it's easy. You know, I have a deadline to meet with Florida Power, I can't meet it with my crew not working, you know, I could go back there and kick Juan off the roof and lord knows what happens with the rest of my crew, so I chose to fire Tracy. [TR 232-33].
>
> A. Florida ... that was the biggest, that is still today, the biggest job we have ever undertaken. It was the most prestigious, we were working on a nuclear power plant, we had to complete the job before December 15th, we were ... as it was, behind schedule, that's why we were having to work overtime and work Saturdays, and here it is getting close to the midnight hour and I've got my crew refusing to work for me and I can't replace that crew. [TR 235].

He went on to explain that he fired James not because she had done her job, but because of a "personality conflict" [TR 236], although he later admitted that he had been wrong.

McEnany made a conscious, deliberate choice: to serve the company's business interests by keeping the crew working, while sacrificing James, his security escort. He did not care that her conduct may have constituted protected activity, he said, because he had a job to get done: "It was either Tracy or my crew." [TR 251; also TR 127-128]. Morgan agreed that James had to be fired to keep the job going, but admitted that she had been doing her job properly and that she had been treated unfairly [TR 164-65]

This is not allowed under the Act, and does not constitute a legitimate, nondiscriminatory reason for her discharge.

There certainly can be valid business reason for adverse employment actions: a general reduction in force due to economic conditions, a decision to prefer employees with different or better qualifications or seniority, poor performance, and the like. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y, February 15, 1995), *aff'd sub nom*. Carroll v. U.S. Department of Labor, 78 F.3d 352 (8th Cir. 1996). Standing alone, the need to keep a crew working is certainly a valid business reason. An employer has a legitimate interest in making personnel adjustments when the conduct of one employee adversely impacts his co-workers. Delaney v. Mass. Correctional Industries, 90-TSC-2 (Sec'y, March 17, 1995) *aff'd* 69 F.3d 531 (1st Cir. 1995) (unpublished opinion)..

But that is not the situation here. An employer's preferring to reinforce his crew's refusal to abide by security instructions, and firing the security person in order to keep the job going, cannot by any stretch of the imagination constitute a valid business reason. To allow a crew to flout and protest the enforcement of security rules, and then successfully maneuver the employer into punishing the *security personnel* would turn the Act upside down, putting security decisions in the hands of the people who are supposed to follow the rules rather than in the hands of those who are trained to oversee compliance. To allow an employer to choose his own business interests over the remedial purposes of the Act by claiming a "personality conflict" would so dilute the ability of security personnel to do their job, that the Act would become meaningless. Indeed, James contends that she would "think twice" about blowing the whistle on security violations, given what has happened to her [TR 88].

An employer is not expected to tolerate abusive or unreasonable conduct by a security employee in positions such as James's, and can place reasonable constraints on the performance of that employee's work. Lockert v. U.S. Department of Labor, 867 F.2d 513 (9th Cir. 1989); Floyd v.Arizona Public Service Co., 90-ERA-39 (Sec'y , September 23, 1994). At the same time, the Act actually encourages safety and security employees such as James to be alert and aggressive in addressing security and safety concerns. In considering the propriety of the complainant's conduct, the right of the employer to maintain discipline in the workplace must be balanced against the "heavily protected" statutory rights of the employee. To fall outside statutory protection, an employee's conduct must reach the level of being egregious or indefensible. Carter v. Electrical District No. 2 of Pinal County, 92-TSC-11 (Sec'y, July 26, 1995); Martin v. Department of the Army, 93-SDW-1 (Sec'y, July 13, 1995).

Here, the evidence did not establish overbearing conduct on James' part. To the contrary, it established surly and begrudging conduct by the crew, and at best a lackadaisical attitude by Morgan, who seemed to blame James for complaining and accused her of "costing him his job" when she reported Ramirez [TR 65]. In this regard, I am not persuaded by the testimony of Ms. Roberts, who seemed not as upset at the crew's behavior as did James. Although James argues neither constructive discharge nor hostile environment, it is useful to borrow from the principles in that area, both as to liability and later in this discussion as to appropriate remedies. This is because the Act is intended to protect employees not only from retaliatory discharge or suspension, but also from harassment constituting a hostile work environment. English v. General Dynamics Corp., 85-ERA-2 (Sec'y, February 13, 1992). Such an environment is one in which hostility is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). "Hostility"

must be established by way of both a subjective standard and an objective -- or "reasonable person" -- standard. Harris v. Forklift Systems, Inc., 507 U.S. ___, ___ S.Ct. ___ (1993).

James testified that the crew directed vulgarities toward her, threatened her physically, and even that two of them [one being Ramirez] urinated off the roof right in front of her [TR 42, 45-51, 57, 65-66]. Morgan confirmed that both Roberts and James had told him about the urinating incident with Ramirez; and that he was aware of the crew using lewd language but he never told the crew to cease and desist [TR 158-62, 168, 225]. Roberts testified that they used "coarse language" sometimes [TR 186]. Indeed, when the crew walked off the job that day, they told Mike McEnany "we cannot work for that bitch" [TR 264-265]. While Roberts may indeed have had a thick skin, her testimony does not establish that James had a thin one. Rather, the evidence suggests that Roberts did not enforce the rules as closely as James, and that the hostility was not directed to Roberts. Under both a subjective and an objective standard, it would be proper to find such an environment hostile to intolerable.

One of the most telling pieces of evidence for the undersigned is that two days after the incident on October 11, when Mike McEnany finally understood the importance of safety and security, and his crew's compliance with those rules, he gathered all his workers up and laid down the law to them. [CX 18; TR 239-240]. At that point, the behavior of the crew improved, and they began to comply [TR 230]. Had the management of McEnany Roofing taken these steps when James initially requested help on those many previous occasions, the incident of October 11 might never have happened. As it was, management allowed or ignored a work environment where the complainant was ridiculed, embarrassed, called names and exposed to threatening behavior by the crew, to which the company turned a winking eye. This in itself demonstrates "antagonism toward activity that is protected under the ERA." Timmons v. Mattingly Testing, 95-ERA-40 (ARB, June 21, 1196). Respondent's lack of support for her job and then its discharge of her for *doing* her job created an intolerable situation for James, one that she would understandably decline to return to [TR 82].[9]

Indeed, Mike McEnany now realizes that he was wrong to have fired her:

> A. ... I did the wrong thing. I didn't ... forget the laws, forget the rules, I did the wrong thing. The lady was doing her job. ...

[9]McEnany never informed James that he had spoken to the crew on October 13 about the need to comply with security rules and that their behavior had improved. [TR 258-259].

A: I fired her because I had a situation where I had a crew that was not going to work if she was on the job.
Q: And that's because she was doing her job, wasn't it?
A: Yes, sir. [TR 244].

2. Whether respondent was motivated by a legitimate reason for the discharge

Addressing the issues of motivation and causal nexus, respondent attempts to argue that James was fired not because she was doing her job, but because the crew walked off the job. This argument attempts to create a distinction without a difference. The crew's "mutiny" arose directly from James' performance of her job, perhaps indirectly aided and abetted by respondent's failure to support her previously, and she bore the adverse consequence of the situation. The crew's action in walking off the job is not at issue in any event. It is the employer's action toward James that is at issue.

Respondent relies on Delaney v. Mass. Correctional Industries, *supra*, 90-TSC-2 (Sec'y, Marrch 17, 1995) for the proposition that an employer motivated by concern for the overall climate and security of the facility when it transferred complainant may do so despite the complainant's having engaged in protected activity. This is not a situation like that seen in Delaney. That case involved improper conduct by the complainant in terms of the way he broached his safety concerns with his supervisor. It is significant to the undersigned that the Secretary explicitly limited his holding to the "unusual facts of the case," which involved a prison setting. Under other circumstances, the Secretary held, the manner in which complainant conducted himself would not have deprived him of whistleblower protection. In any event, there is no evidence whatsoever of misconduct by James.

D. Synthesis of prima facie case and evidence of motivation

I therefore find that the respondent has failed to rebut the claimant's *prima facie* case. Claimant's *prima facie* case being not contradicted or overcome by respondent's evidence, she is entitled to prevail. Carroll v. Bechtel Power Corp., 91-ERA-46 (Sec'y February 15, 1995), *aff'd sub nom*. Carroll v. Department of Labor, 78 F.3d 352 (8th Cir. 1996).

I further find that the evidence establishes by a preponderance that the proffered motivation -- to avoid the crew walking off the job -- was not a legitimate reason for discharging her. The events on October 11, 1995, particularly when seen in light of the events leading up to it, suggest that James' was highly resented by the crew and that performance of her security/safety duties was merely tolerated by management. Safety and security oversight were the first to go when the need to finish the job was imperiled.

Complainant argues that there is direct evidence of discrimination, such that the foregoing shifting burden of proof analysis is unnecessary. Such a conclusion is warranted on the record before me, and I find in the alternative that because there is unrebutted direct, as well as circumstantial, evidence of discrimination, complainant is entitled to judgment. In such a case, respondent can avoid liability only by showing that it would have taken the same action in the absence of James' protected activity. Jones v. Gerwens, 874 F.2d 1534, 1539, N. 8 (11th Cir. 1989); Blake v. Hatfield Elec. Co., 87-ERA-4 (Sec'y, January 22, 1992).

E. Assuming Respondent had articulated a legitimate nondiscriminatory reason for discharging Complainant, whether there is "clear and convincing" evidence that she would have been discharged independently of her protected activity?

Even assuming respondent had successfully rebutted complainant's *prima facie* case, Mike McEnany's own testimony reveals that his decision to terminate complainant was motivated, at least in part, by a protected activity. Under the "dual motive" framework, in order to avoid liability under the Act, the respondent must show by "clear and convincing" the evidence that it would have made the same decision to discharge James even in the absence of the protected conduct. In such cases, the respondent bears the risk that the influence of the legitimate and prohibited motives cannot be separated. Crosier v. Portland General Electric Co., 91-ERA-2 (Sec'y, January 15, 1994).

For purposes of the analysis, one can assume that the need to keep the crew on site and working is a legitimate business reason for adverse action. Indeed, standing alone and out of context, the need to keep one's employees working must constitute a legitimate business reason. However, as indicated above, such a decision cannot constitute a legitimate reason when, as here, it is inextricably linked with James' protected activity. Respondent concedes that James' work performance was always good [ALJX 19, p. 15]. Mike McEnany had no problem with her work. There was no indication whatsoever that her job was in jeopardy [TR 47-48, 121, 128-29, 152, 259]. McEnany admits that the way she was performing her job had nothing whatsoever to do with his decision to fire her [TR 263]. It was the *fact* that she was performing her job that led to her discharge.

On the basis of the record before me, I conclude that respondent has failed to demonstrate that it would have terminated James even if she had not engaged in protected activity. There is no "clear and convincing" evidence -- or indeed, any evidence at all -- that James would have been fired but for her enforcement of the plant security rules and the crew's walking off the job in protest

F. Whether claimant has borne her burden of proof.

As indicated previously, the claimant retains at all times the burden of proof by a preponderance of the evidence. Having thoroughly reviewed the evidence above, I find that the preponderance of the evidence establishes each and every element of her whistleblower claim. Specifically, the evidence demonstrates that James was engaged in protected activity when she reported Ramirez, that respondent knew about the protected activity, and that an adverse employment decision was made against her for that reason.

Further, the evidence establishes that respondent's stated reason for discharging James -- to keep the crew on the job -- is not a legitimate reason under the Act, because it is inseparable from the performance of her duties as a security escort. Respondent has further failed to establish that it would have discharged the complainant even if she had not engaged in protected activity. Rather, I find that respondent intentionally discriminated against complainant because she had engaged in protected activities.

Accordingly, I find and conclude that complainant Tracy James is entitled to relief under the Act.

REMEDIES

Based upon my finding that respondent has violated the Act, complainant is entitled to damages pursuant to 42 U.S.C. § 5851(b)(2)(B) and 29 C.F.R. § 24.6(b)(2). Complainant seeks back pay and interest from the date of her discharge until October 28, 1995, in the amount of $603.50 [CX 19, p. 2]. Complainant also seeks front pay in an unspecified amount, compensatory damages of $25,000, and attorneys fees in an amount to be determined by separate proceedings.

A. Wages: Back and Front Pay

An award of back pay is not a matter of discretion but is mandated once it is determined that an employer has violated the Act. Adams v. Coastal Production Operators, Inc., 89-ERA-3 (Sec'y, August 5, 1992). The purpose of a back pay award is to make the employee whole by restoring the employee to the position where he or she would have been had the unlawful discharge not occurred. Blackburn v. Metric Constructors, 86-ERA-4 (Sec'y, October 30, 1991), slip op. at 11, *aff'd sub nom.* Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992).

Back pay ordinarily runs from the date of discharge to the date that complainant receives a bona fide offer of reinstatement. Williams v. TIW Fabrication and Machining, 88-SDW-3 (Sec'y, June 24, 1992). However, although respondent made an unconditional offer of reinstatement only a few hours after her discharge, it had not at that time taken steps to assure that the workplace was safe and no longer hostile. *Cf.* Boytin v. Pennsylvania Power and Light Co., 94-ERA-32 (Sec'y, October 20, 1995). As such, I find that James was not required to accept the offer and that her back pay continued.

Respondent has stipulated that the sum of $603.50 is an accurate calculation of complainant's back pay [TR 85-86]. That sum is therefore awarded, along with other related benefits, and pre-judgment interest calculated pursuant to 26 U.S.C. §6621.

I note that James obtained alternative employment with Florida Power at the Crystal River plant effective October 30, 1995 at a higher rate of pay than she was earning with respondent [TR 85].

James argues that she is entitled to front pay in lieu of reinstatement. Front pay may be appropriate where "discord and antagonism" would render reinstatement an ineffective remedy. Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985); Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Sec'y, February 14, 1996). As indicated throughout this decision and order, reinstatement was not a viable option when offered, and is not sought by complainant. In West v. Systems Applications International, 94-CAA-15 (Sec'y, April 19, 1995), the Secretary held that the administrative law judge may order reinstatement despite complainant's not seeking it, when complainant offers no strong reason for not returning to her former job. In that event, respondent's back pay liability terminates upon its tender of a bona fide offer of reinstatement, whether complainant accepts it or not.

More practically for this case, however, an additional award of front or back pay would be meaningless in this situation, where complainant has been employed since October 30, 1995, is now earning more than she did with McEnany, and her post-discharge earnings will offset any front or back pay award after October 30, 1995..

B. Compensatory Damages

Complainant claims compensatory damages in the amount of $25,000, primarily for emotional distress. The Act authorizes compensation for pain, suffering, mental anguish or loss to reputation. 42 U.S.C. § 5851(b)(2)(B).

The record establishes that James was extremely upset and crying on the day of her discharge, and that thereafter she experienced difficulty sleeping, eating and functioning socially, and visited a physician who prescribed Valium. In the days that followed her discharge, she was worried that members of the crew might follow her [TR 86-87]. She was also concerned about her reputation at work, where she found news articles posted in the locker room about her job situation [TR 88-89]. Her husband corroborated the troubles she experienced [TR 170-173] and there was no evidence to contradict it.

On the other hand, there is no evidence that she suffered physical harm, wage loss over $600, or other financial loss such as home or penalties on retirement withdrawals. Comparative review of other cases awarding compensatory damages for emotional distress and humiliation shows a range from $1,000 to $50,000. For example, in Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Sec'y, February 14, 1996), the complainant suffered emotional distress, humiliation and loss of reputation much like that described by James. However, he also had a heart attack, arguably because of the layoff, was out of work for several months and had to dip into his retirement fund. The Secretary had doubts about an actual connection between the layoff and the heart attack, but concluded that an award of $40,000 was justified for the emotional distress.

Damages for emotional distress are not amenable to precise calculation, yet that does not and should not preclude an award for the suffering attributable to it. Given the awards previously approved by the Secretary, the sum of $25,000 is justified under the circumstances of this case.

C. Attorneys' fees

Complainant is entitled, as the prevailing party, to an award of reasonable attorney's fees and expenses related to the complaint. The complainant's attorney is directed to submit documentation of fees and expenses incurred within 15 days of the issuance of this Recommended Decision and Order, to which the respondent may respond not later than the close of business, September 30, 1996. The parties' attention is directed to Sutherland v. Spray Systems Environmental, 95-CAA-1 (ARB, July 7, 1996) in reference to the presentation and calculation of fees and expenses.

IV. RECOMMENDED ORDER

For the foregoing reasons, it is hereby **ORDERED** that respondent Pritts-McEnany Roofing, Inc., also known as McEnany Roofing, shall make complainant Tracy A. James

whole for losses suffered by reason of its unlawful discharge of her, by paying the following amounts:

1. For the period of October 11, 1995 to and including October 28, $603.50 representing lost wages in the form of back pay, plus pre-judgment interest calculated pursuant to 26 U.S.C. §6621, plus any fringe benefits the complainant would have accrued during that period; and

2. In compensation for mental and emotional distress, the sum of $25,000.

It is further **ORDERED** that respondent take the following remedial action:

1. Remove from complainant's personnel and other records any and all adverse references regarding her protected activities;

2. Refrain from including statements in any job references which have the effect of "blacklisting" complainant because of the performance of her protected activities; and

3. Post a copy of the Secretary's final Decision and Order for a period of thirty (30) days after review and issuance by the Administrative Review Board, in conspicuous places where respondent's employees may congregate; and further provide a copy of the Secretary's final Decision and Order to any of its employees who may request a copy.

IT IS FURTHER ORDERED that within fifteen (15) days of the issuance of this Recommended Decision and Order, complainant's attorney shall submit to the undersigned and to counsel for respondent documentary evidence of the professional fees and expenses incurred in pursuing this litigation to date. The parties are encouraged to enter into stipulations as to such aspects of the complainant's fees and expenses as they can reasonably agree to. Respondent shall submit its objections, if any, to the undersigned and to counsel for complainant not later than the close of business, September 30, 1996.

_____

Christine S. McKenna
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave. N.W., Washington, D.C. 20210. The Administrative Review Board has the authority to issue final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978-19989 (1996).